Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation	)	WT Docket No. 04-70
	)	
For Consent to Transfer Control of Licenses and Authorizations	)	
	)	
File Nos. 0001656065, *et al.*;	)	
	)	
Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation	)	WT Docket No. 04-254
	)	
For Consent to Assignment and Long-Term De Facto Lease of Licenses	)	
	)	
File Nos. 0001771442, 0001757186, and 0001757204;	)	
	)	
Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC	)	WT Docket No. 04-323
	)	
For Consent to Assignment of Licenses	)	
	)	
File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04	)	

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Cingular Wireless Corporation ("Cingular") hereby opposes the Petition for Reconsideration ("Petition") filed in the name of Acadiana Cellular General Partnership ("Acadiana" or "Partnership") and two of its general partners, Louisiana Cellular, Inc. ("LCI")

and Delcambre Cellular, Inc. ("DCI") (collectively "Petitioners"), on November 26, 2004.[1] The Petition purportedly seeks reconsideration of certain competitive findings contained in the Commission's Order approving the merger of AT&T Wireless Services, Inc. ("AWS") and Cingular.[2] In reality, the Petition is an attempt by LCI and DCI to gain leverage in a private business dispute in order to pressure Cingular to sell AWS spectrum to the Partnership on terms acceptable to LCI and DCI. The *Merger Order* specifically recognizes the Commission's long-standing position that private disputes "are not relevant to our public interest analysis and are best resolved in courts of competent jurisdiction."[3] For the reasons that follow, the Petition should be summarily dismissed or denied.

BACKGROUND

Acadiana is a partnership comprised of three general partners, with Cingular serving as the managing general partner.[4] The Partnership holds two 25 MHz cellular licenses for RSAs located within BTA 032: one covering portions of the Louisiana 5 – Beauregard RSA; the other covering portions of the Louisiana 6 – Iberville RSA.

On February 17, 2004, Cingular announced that it had reached an agreement to merge with AWS. As part of the deal, Cingular sought to acquire PCS licenses covering BTA 032 and

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[1] Petitioners have failed to satisfy the service obligations contained in Section 1.106(f) of the Commission's rules which require that the Petition be served upon all parties to the proceeding. 47 C.F.R. § 1.106(f). Given that Cingular was the only party served with the Petition, it hereby seeks a waiver of the service obligation with respect to oppositions contained in Section 1.106(g). 47 C.F.R. § 1.106(g). The Opposition is being filed electronically and, therefore, interested parties that are monitoring the docket will have access to the filing in a timely fashion.

[2] *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation,* WT Docket No. 04-70, *Memorandum Opinion and Order*, FCC 04-255 (rel. Oct. 26, 2004) ("*Merger Order*").

[3] *Merger Order* at n. 222.

[4] BellSouth Mobility LLC, a Cingular affiliate, serves as the managing general partner with a 35 percent interest in the Partnership. Cingular notes that, by filing the Petition on behalf of the Partnership, LCI and DCI have violated the partnership agreement and the Delaware Revised Partnership Act.

totaling 30 MHz. The Commission established May 3, 2004 as the deadline for submitting petitions to deny the merger.[5]

Shortly after the deal was announced, LCI and DCI asked Cingular representatives whether the PCS licenses would be integrated into the Partnership and, if so, on what terms. Cingular representatives repeatedly told LCI and DCI that no decisions could be made until *after* the merger was approved and closed, at which point Cingular could properly value the licenses. LCI and DCI let the merger pleading cycle lapse without submitting a single filing in the docket.

On October 26, 2004, the merger was approved by the FCC and closed later that day. On November 4, 2004, Cingular met with LCI to discuss the potential contribution to the Partnership of those portions of the AWS licenses covering areas served by Acadiana (the "BTA Licenses"). LCI was not satisfied with Cingular's proposal. Shortly thereafter, the instant Petition was filed.

On December 3, 2004, Petitioners also filed suit in Louisiana state court alleging a breach of the Acadiana partnership agreement based on the same facts presented in the instant Petition.[6]

I. THE PETITION MUST BE DISMISSED BECAUSE THE PETITIONERS LACK STANDING

Section 405 of the Communications Act of 1934, as amended (the "Act"), as implemented by Section 1.106 of the Commission's rules, limits petition for reconsideration standing to "any party [to the proceeding] or any other person aggrieved or whose interests are adversely affected thereby."[7] Moreover, if a petition for reconsideration is filed by a person who is not a party to the proceeding, the petitioner must "show good reason why it was not possible

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[5] *See AT&T Wireless Services, Inc. and Cingular Wireless Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, *Public Notice*, DA 04-932 (rel. Apr. 2, 2004) ("*Public Notice*").

[6] *See Acadiana Cellular General Partnership v. BellSouth Mobility, L.L.C.,* Suit No. 104238 (16th Jud. Dist. Ct., LA. filed Dec. 3, 2004).

[7] 47 U.S.C. § 405(a); *see* 47 C.F.R. § 1.106(b)(1).

for him to participate in the earlier stages of the proceeding."[8] Thus, interested persons seeking to participate in FCC proceedings are required to join the proceedings at the "earliest opportunity."[9] Petitioners lack standing because they (i) had every opportunity to participate in the proceeding and intentionally declined to do so, and (ii) are not harmed by the *Merger Order.*

A. Petitioners Were Not Parties to the Proceeding and Have Not Demonstrated Why Earlier Participation Was Not Possible

Petitioners admit that they are not parties to the proceeding. Therefore, pursuant to Section 405 of the Act, they must demonstrate why earlier participation was impossible. Here, Petitioners should have participated in the proceeding no later than May 3, 2004 – the date established by the FCC for submitting petitions to deny the merger.[10] Petitioners state that the reason they did not file at that time was their belief that Acadiana would be able to purchase the BTA Licenses from Cingular. Petitioners admit that they "considered alerting the Commission to the[] facts before the *MM&O* was released,"[11] but claim that they did not file because of "false inducement" by Cingular regarding the sale of the BTA Licenses to the Partnership on terms they deemed satisfactory.[12]

The false inducement allegation, even if it were true, does not establish good cause for the failure to timely participate at an earlier stage of the proceeding. The assumption that Acadiana would be able to acquire the BTA Licenses on terms acceptable to LCI and DCI does not constitute the requisite good cause for the Petitioners' failure to participate earlier. To the

[8] 47 C.F.R. § 1.106(b)(1). Underlying this rule are the dual principles of "finality and exhaustion of administrative remedies." *See Heritage Cablevision Assoc. of Dallas, L.P. v. Texas Util. Elec. Co.*, 7 F.C.C.R. 4192, 4192 (1992) citing *United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C.Cir.1990) (citations omitted).

[9] *See Heritage Cablevision*, 7 F.C.C.R. at 4192.

[10] *See Public Notice*, DA 04-932 (rel. Apr. 2, 2004).

[11] Petition at 5.

[12] *See id.* at 4-5.

contrary, the Commission has expressly stated that: "a person who has a right to participate in a proceeding before the Commission *cannot delay exercising that right* until after the Commission has acted and then expect to be allowed to participate by filing post-grant pleadings."[13] There is good reason for this policy:

> Administrative efficiency will not permit a party to lean back and await the outcome of a decision, and then, if it is unfavorable to its cause, to come forward seeking to present new evidence. "No judging process in any branch of government could operate efficiently, or accurately, if such a procedure were allowed." If a party has evidence to present, he should present it in a timely fashion, and not . . . offer such evidence after a decision has been made.[14]

Moreover, not only have Petitioners sat on their rights, but there was no false inducement. Cingular ***never*** made an offer to sell the BTA Licenses to Acadiana prior to merger approval. Cingular repeatedly told LCI that negotiations would not commence until after the merger was approved. The Petitioners have no excuse for failing to participate during the normal pleading cycle and are improperly attempting to use the Commission's reconsideration process as leverage in private negotiations.[15] Thus, the Petition is barred.

B. Petitioners Are Not Aggrieved by the *Merger Order*

To establish standing in licensing matters, a petitioner must allege sufficient facts to demonstrate that failure to grant the requested relief would cause the petitioner to suffer a *direct*

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[13] *Concord Telephone Exchange, Inc.*, 56 RR 2d 653, 656-57 (1984) (emphasis added); *accord Press Broadcasting Co.*, 3 F.C.C.R. 6640 (1988), *aff'd sub nom. United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990) (denying standing to file petition for reconsideration based on claim that lack of participation earlier was due to a mistaken belief that an application would be denied).

[14] *American Telephone & Telegraph Co.*, 46 F.C.C.2d 878, 880 (1974) (footnotes omitted), *quoting Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

[15] Petitioners claim that the Commission was unaware of the licenses in which Cingular would hold attributable interests after the merger. Petition at 5. As shown below, however, the Commission was well aware of the number of licenses and the amount of spectrum that Cingular would hold as a result of the merger.

injury.[16] The petition must further demonstrate a causal link between the claimed injury and the challenged action by establishing that (1) the injury fairly can be traced to the challenged action, (2) the injury would be prevented or redressed by the relief requested,[17] and (iii) the injury must be within the "zone of interests" protected by the Act.[18]

Here, the purported injury for which Petitioners seek redress is Cingular's failure to sell the BTA licenses to the Partnership on terms desired by LCI and DCI. This alleged injury, however, falls outside the the zone of interests protected by the Act.[19] Second, the alleged injury has no causal link to the *Merger Order.* The order had no impact on the terms upon which the Partnership could acquire the BTA Licenses. Further, a grant of the Petition will not result in the Petitioners acquiring the spectrum. Petitioners claim that the merger caused Cingular to acquire market power in BTA 032 and, therefore, seek an FCC order requiring Cingular to divest the BTA Licenses. Divestiture to Acadiana would not be possible, however, because the

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[16] *See Daniel R. Goodman*, 14 F.C.C.R. 20547, 20549 (1999).

[17] *See id.* citing *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978). *See also City of Compton Police Department*, 15 F.C.C.R. 16563, 16566 (WTB rel. April 7, 2000). This is the same test that is used by the federal courts in determining whether a petitioner for judicial review of a Commission decision has standing under Article III. *See, e.g., Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410 (D.C. Cir. 1998).

[18] *Conf. of America v. American Postal Workers Union*, 498 U.S. 517, 523 (1991); *Assoc. of Data Processing Services Organization et al. v. Camp, Comptroller of the Currency*, 397 U.S. 150, 153 (1970); *Barlow v. Collins*, 397 U.S. 159, 164 (1970);*Petition for Rulemaking to Establish Standards For Determining Standing*, 82 F.C.C.2d 89, 96 (1980). The zone of interest test denies a right of review if the petitioner's interests are so marginally related to or inconsistent with the purposes expressed or implicit in the statute or regulation that it cannot reasonably be assumed that Congress or the Commission intended to permit the cause of action. *Clark v. Securities Industry Ass'n.*, 479 U.S. 388, 399 (1987).

[19] *See State Street Bank and Trust Company v. Arrow Communications*, 833 F.Supp. 41 (U.S.D.C. D.Mass. 1993) (citing *KMJC-FM*, File No. BALH-921008HF, *Letter Ruling* (Feb. 25, 1993);.*see also Milford Broadcasting Co.*, 8 F.C.C.R. 680 (1993) (Private disputes are beyond the Commission's regulatory jurisdiction and must be resolved in a local court of competent jurisdiction); *Centel Corp.*, 8 F.C.C.R. 1829, 1831 (1993); *Sonderling Broadcasting Co.*, 74 FCC 2d 657 (1979); *John R. Kingsberry,* 71 FCC 2d 1173, 1174 (1979).

Partnership's holdings would be attributable to Cingular.[20] If Cingular is precluded from holding the BTA Licenses, the Partnership would be similarly precluded.

II. THE PETITION LACKS MERIT AND SHOULD BE SUMMARILY DENIED

Not only does the Petition fail to establish standing, it is meritless. The Commission has indicated that "[r]econsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."[21] Petitioners have not, and cannot, make this showing.

Contrary to Petitioners' claims, the Commission had all the relevant facts before it when it approved Cingular's acquisition of the AWS licenses, and it fully considered the effect on competition in the license areas in which Petitioners have ownership interests (CMA 458 and CMA 459). First, the applications clearly identified each of the new licenses Cingular would acquire. Attachment 8 to the lead application set forth a county-by-county analysis of the amount of spectrum Cingular held prior to the merger – including spectrum attributable as a result of Cingular's participation in Acadiana – and the amount of spectrum Cingular would hold after the merger. Further, the Form 602 Ownership Report filed with the applications identified that Cingular held an attributable interest in Acadiana.[22]

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[20] *See* 47 C.F.R. §§ 1.919, 1.2112 (discussing attributable interests in the context of reporting ownership information).

[21] *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106.

[22] Acadiana states that "Cingular and AWS failed to disclose that Cingular has a general partnership interest in Acadiana Cellular" in Attachment 9 to the lead merger application. Petition at 5. Attachment 9 was never intended to identify all attributable interest holders. The Suffix Key made clear that the suffixes used in the Attachment were limited to situations where an entity held 50% or more of the licensee and "does not indicate where managing party owns less than 50%." Cingular's interest in Acadiana was fully disclosed on the Form 602 Ownership Report and the Acadiana spectrum was included in spectrum attributed to Cingular in the county-by-county spectrum analysis contained in Attachment 8 to the lead application.

Second, Petitioners' claims of competitive harm are misleading and incorrect. While Cingular holds attributable interests in three licensees in Cellular Block B within BTA 032, those licenses are for mutually exclusive partitioned geographic areas.[23] Thus, Cingular does not hold three cellular licenses that are used to provide service in the same area. Petitioners' further argument that the acquisition will cause anticompetitive effects in BTA 032 was considered and rejected by the Commission. The *Merger Order* notes that the Component Economic Areas encompassing Baton Rouge (CEA 0760); the CMAs in which Petitioners hold ownership interests (CMAs 458 and 459); and the CMA for Baton Rouge (CMA 080) were all identified for case-by-case analysis after application of an initial screen.[24]

The Commission's decision that no anticompetitive effects were likely in these areas was well founded. Among other things, the Application and supporting materials demonstrated that, after the merger, Cingular would hold no more than 55 MHz in any county in BTA 032 and that there would be at least eight unaffiliated entities holding licenses in the BTA. The United States Department of Justice also thoroughly reviewed the proposed merger and found no competitive issues with respect to BTA 032.

The reason the Petition was filed has nothing to do with the competitive analysis undertaken in the *Merger Order*. LCI and DCI admit they are disgruntled because of Cingular's failure to sell the BTA Licenses to the Partnership on their terms.[25] Indeed, Petitioners have filed

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[23] Thus, Petitioners' contention that Cingular has attained ownership interests in "three different entities competing in Cellular Block B of BTA 032," Petition at 5, must be rejected.

[24] *See Merger Order* at ¶110 and Appendix C.

[25] Petition at 5-6. Petitioners cannot really claim to be concerned about, or affected by, any *competitive impact* caused by Cingular's acquisition of AWS's licenses in BTA 032. If Acadiana acquired the BTA licenses, it would have a *direct* control over 55 MHz – the same amount of spectrum in which the *Merger Order* granted Cingular an *indirect, attributable* interest.

a lawsuit in Louisiana state court demonstrating the true nature of the dispute. There, for the same reasons alleged in the Petition, they maintain that Cingular has breached the Acadiana partnership agreement. Thus, Petitioners are seeking FCC intervention in a private partnership dispute. As the Commission recognized in the *Merger Order*, however, "private contractual disputes . . . are not relevant to [the] public interest analysis and are best resolved in courts of competent jurisdiction."[26] Petitioners have not advanced any reason why the Commission should not adhere to that principal here – and there is none.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed or denied.

Respectfully submitted,

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December 9, 2004

[26] *Merger Order* at n. 222; *accord Centel Corp.*, 8 F.C.C.R. at 1831 ("[T]he alleged violation of the partnership agreements amounts to a contractual dispute ... and, therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them." (citation omitted)); *Sonderling*, 74 FCC 2d 657 (Commission is not the proper forum for the resolution of private contractual disputes and such matters are appropriately left to the courts).

CERTIFICATE OF SERVICE

I, Paula Lewis, do hereby certify that a copy of the foregoing "Opposition to Petition for Reconsideration" was served this 9th day of December 2004, via first class U.S. Mail, on the following:

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